Supreme Court, U. S.
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IN THE

Supreme Court of the United States

January Term, 1980

No. 79-1173

CHARLES JOSEPH STEMPER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
REASONS FOR DISALLOWANCE OF WRIT	3
A. Independent State Ground	3
B. Indiana Law Does Not Shift Burden to Defendant	4
C. Standing	6
CONCLUSION	8
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases:	*Page*
Ballard v. State, 262 Ind. 482, 318 N.E.2d 798 (1974)	3
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	7
Chapman v. California, 386 U.S. 16 (1967)	8
County Court of Ulster County, New York v. Allen, 99 S.Ct. 2213 (1979)	7
Gutierrez v. State, — Ind. —, 395 N.E.2d 218 (1979)	4
Holloway v. State, — Ind. App. —, 352 N.E.2d 523 (1976)	4
Lemay v. State, 244 Ind. 652, 190 N.E.2d 189 (1963)	5
McDonald v. State, 264 Ind. 477, 346 N.E.2d 569 (1976)	4
Mullaney v. Wilbur, 421 U.S. 684 (1975)	4, 5, 6, 7
Murphy v. State, 267 Ind. 184, 369 N.E.2d 411 (1977)	3
Parker v. North Carolina, 397 U.S. 790 (1970)	4
Patterson v. New York, 432 U.S. 197 (1977)	5, 6, 7
Wainwright v. Sykes, 433 U.S. 72 (1977)	4
Wallace v. State, — Ind. App. —, 395 N.E.2d 274 (1979)	4

Statutes and Rules:	
28 U.S.C. § 1257(3)	3
Indiana Rules of Trial Procedure, Rule 59	3
Indiana Rules of Criminal Procedure, Rule 16	3

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CHARLES JOSEPH STEMPER, *Petitioner,*

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STATE OF INDIANA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by the Indiana Court of Appeals in Cause No. 3-378A68 on July 16, 1979.

OPINION BELOW

The Indiana Court of Appeals for the Fourth District entered a memorandum decision in this cause (not for publication) on July 16, 1979. This decision may be found in Respondent's Appendix. Rehearing was denied by the Indiana Court of Appeals on August 13, 1979, and

transfer was denied by the Indiana Supreme Court on November 2, 1979.

STATEMENT OF THE CASE

Petitioner, Charles Joseph Stemper, was indicted by a grand jury on the charge of murder in the first degree for the death of Timothy Luna on November 24, 1976. Petitioner's trial by jury began on September 20, 1977, with the trial judge, on September 22, 1975, directing a verdict for the Petitioner on the charge of first degree murder On September 23, 1977, the jury found Petitioner guilty of voluntary manslaughter. On October 7, 1977, Petitioner was sentenced to a term of imprisonment of not less than two nor more than twenty-one years.

Petitioner appealed his conviction, and on July 16, 1979, the Indiana Court of Appeals for the Fourth District, in a memorandum decision, not for publication, affirmed Petitioner's conviction. Stemper's petition for rehearing was denied on August 13, 1979 (Petitioner's Appendix B), and his petition for transfer was denied by the Indiana Supreme Court on November 2, 1979 (Petitioner's Appendix C.).

STATEMENT OF THE FACTS

The evidence presented at Petitioner's jury trial established that on November 24, 1976, Sandra Luna left her infant son in the care of Petitioner while she visited her sister. Upon her return, Petitioner was leaving the home and indicated to her that Timothy needed her. Sandra foun Timothy dead or dying and was unable to revive him. The infant was pronounced dead on arrival at a local hospital.

Witnesses testified that the child's body had a number of old and new bruises on it and that the cause of death

was a broken neck. Witnesses also testified that Petitioner had been hurting the child just prior to the discovery of the body and that Petitioner had mistreated and injured the child on other occasions. Petitioner's own statement to the police indicated he had hit the child in a meaningful manner.

REASONS FOR DISALLOWANCE OF THE WRIT

A. Independent State Ground

Petitioner asserts the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Respondent contends that this Court is without jurisdiction over this cause as the opinion of the Indiana court of Appeals was based upon an adequate independent foundation of state substantive law and not necessarily upon the consideration of a federal question.

With respect to the issue raised by Petitioner in this Court, it can be readily observed—both in the petition, p.4, and that portion of the opinion of the Indiana Court of Appeals presented in Petitioner's Appendix A, p. 17—that Petition did not, pursuant to Indiana law, properly preserve the alleged error for review by the Indiana appellate courts. Petitioner raised his claim of unconstitutional shifting of burden of proof for the first time in his Brief of Appellant before the Indiana Court of Appeals.

Indiana Rules of Criminal Procedure, Rule 16, and Indiana Rules of Trial Procedure, Rule 59, require that alleged errors first be raised in a motion to correct errors in the trial court. Failure to adhere to these rules results in the waiver of the alleged error for purposes of appellate court review. *Murphy v. State,* 267 Ind. 184, 369 N.E.2d 411, 413 (1977). In addition, Indiana law requires that a party object to alleged errors in a timely and specific manner at trial. *Ballard v. State,* 262 Ind. 482, 318 N.E.2d 798,

807 (1974); *Gutierrez v. State,* — Ind. —, 395 N.E.2d 218, 222 (1979).

Petitioner's failure to adhere to the relevant Indiana procedural requirements regarding the raising of issues for appellate review was, alone, a sufficient ground for the Indiana Court of Appeals to deny Petitioner's claim of error. Therefore, a sufficient state ground exists, independent of any federal question, to sustain Petitioner's conviction. *See, Parker v. North Carolina,* 397 U.S. 790, 798 (1970); *Wainwright v. Sykes,* 433 U.S. 72 (1977). Thus, this petition should be denied.

B. Indiana Law Does Not Shift Burden to Defendant

Furthermore, Petitioner's reliance upon *Mullaney v. Wilbur,* 421 U.S. 684 (1975) is misplaced. Unlike the Maine law involved in *Mullaney,* Indiana law does not require a defendant to prove anything in order to reduce a conviction from murder to manslaughter. Indiana Courts have long held that manslaughter is a lesser included offense of murder and that a jury may return a verdict of guilty of voluntary manslaughter notwithstanding the absence of proof of sudden heat. *McDonald v. State,* 264 Ind. 477, 346 N.E.2d 569 (1976); *Holloway v. State,* — Ind. App. —, 352 N.E.2d 523 (1976). The Court of Appeals has recently considered the elements of voluntary manslaughter, under the new Indiana Penal Code, and has concluded that, as under the old code, "sudden heat" is not an element of the crime of manslaughter. The Indiana Court of Appeals, in *Wallace v. State,* — Ind. App. —, 395 N.E.2d 274 (1979) stated, at 395 N.E.2d 276:

> We now hold that both murder and voluntary manslaughter can be proved by evidence of the knowing or intentional killing of another human being. Because the two offenses can be established by the same material elements, voluntary manslaughter is a lesser included offense of murder.
>
> • • •
>
> The evidence was sufficient for the jury to have returned a verdict of guilty to the charge of murder; the jury, therefore could also return a verdict of guilty of voluntary manslaughter, notwithstanding the lack of proof of sudden heat.

Clearly, under Indiana law the burden is on the State to prove the elements of both murder and voluntary manslaughter. "Sudden heat" is not an element of voluntary manslaughter. *Holloway, supra.* However, in order for a defendant to be convicted of murder in Indiana, it is necessary for the State to prove malice and premeditation (absence of "sudden heat") beyond a reasonable doubt. Indiana does not place a burden on the defendant to negate the intent required for a murder conviction, for the State must demonstrate the requisite elements for murder. *Lemay v. State,* 244 Ind. 652, 190 N.E.2d 189, 191 (1963).

Thus, Indiana law comports with the dictates of *Mullaney, supra,* wherein this Court held, at 421 U.S. 704:

> We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

Furthermore, this Court's opinion in *Patterson v. New York,* 432 U.S. 197 (1977), would indicate that Petitioner's claim that "sudden heat" is a mitigating factor under Indiana law, which Petitioner finds offensive, does not render the Indiana law in violation of due process. The Court stated, at 432 U.S. 210:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.* (emphasis added).

Thus, it would appear that even if Indiana did require the accused to present evidence of sudden heat in order to mitigate a murder charge, such would not violate any constitutional requirements.

C. Standing

Finally, Respondent, State of Indiana, asserts that Petitioner's claim for relief must fail for the additional reason that Petitioner has not been prejudiced by the alleged constitutional error upon which he bases this petition. Petitioner argues that the Indiana law falls within the proscription of *Mullaney, supra,* and that a decision is needed by this Court to determine if the Indiana law falls within *Mullaney* or *Patterson, supra.* This is Petitioner's claim of a substantial federal question. However, the facts in this case clearly distinguish this cause from the federal question raised in either *Mullaney* or *Patterson.*

The federal question considered in *Mullaney, supra* and *Patterson, supra,* and which Petitioner attempts to raise here involved the shifting of the burden of proof to the defendants. In *Mullaney* and *Patterson,* the defendants were convicted of murder and complained that the state had shifted the burden of persuasion to them in order to establish manslaughter. Clearly, if the State in those cases had unconstitutionally shifted the burden to the defendant, these defendants could assert a real harm—the fact that they had been convicted of murder rather than manslaughter.

Unlike the defendants in *Mullaney* and *Patterson,* Petitioner was *not* convicted of murder, but rather, the trial judge directed a verdict for Petitioner on the first degree murder charge and Petitioner was convicted by a jury only of voluntary manslaughter. Thus, Petitioner's entire argument has no relevance whatsoever to his factual situation. Even assuming *arguendo* that Indiana did unconstitutionally shift the burden to Petitioner as claimed, Petitioner has in fact suffered no harm for he has obtained the relief he now seeks—the opportunity to be convicted of manslaughter rather than murder. Petitioner, who was not convicted of murder, does not have standing to assert that Indiana law unconstitutionally requires a defendant to shoulder the burden of presenting evidence in order to reduce a murder charge to manslaughter. In effect, Petitioner is asserting the rights of parties not involved in this action. Thus, Petitioner lacks standing to raise the issue he argued. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *County Court of Ulster County, New York v. Allen,* 99 S.Ct. 2213 (1979).

It is the State's position, therefore, that a writ of certiorari is inappropriate in this cause for Petitioner, based

upon the particular fact situation of this cause, has not in fact advanced a justiciable and substantial federal question for Petitioner does not have standing to raise the claimed error. Moreover, even assuming that the Indiana law is unconstitutional as Petitioner claims, the particular facts of this case clearly demonstrate that the error, if any, did not prejudice the substantial rights of Petitioner. Thus, the error, if any, was harmless beyond a reasonable doubt, with respect to Petitioner's conviction. *Chapman v. California,* 386 U.S. 18, (1967).

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issue alleged by Petitioner has been adequately disposed of pursuant to State law grounds, that the issue alleged by Petitioner does not raise a substantial federal question, and that the error alleged by Petitioner has not prejudiced the substantial rights of Petitioner. Furthermore, Petitioner lacks standing to raise the error claimed. Respondent, therefore, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

CHARLES JOSEPH STEMPER,
Defendant-appellant,
v.
STATE OF INDIANA,
Plaintiff-appellee.

No. 3-378 A 68

APPEAL FROM THE LAKE SUPERIOR COURT, CRIMINAL DIVISION

The Honorable James Kimbrough, Judge

MEMORANDUM DECISION

CHIPMAN, P.J.

Charles Joseph Stemper appeals his conviction of voluntary manslaughter alleging: (1) the trial court erroneously denied his motion in limine and admitted certain photographs; (2) the trial court's denial of the motion to suppress statements made by Stemper and the admission of those statements at trial was reversible error; and (3) the jury's verdict is contrary to law because (a) sudden heat was not proven, or alternatively, (b) if sudden heat was not required to be proven, there was an unconstitutional shifting of the burden of proof.

We affirm.

I. Admission of Photographs

Photographs of the deceased child, taken at the hospital emergency room, were admitted into evidence and shown to the jury over Stemper's objection. Stemper contends the photographs were introduced in order to arouse passion and prejudice in the jurors' minds, and therefore, he asserts it was error to admit them.

Generally, the admission or exclusion of photographic evidence is within the sound discretion of the trial court, and the trial court's action therein will be disturbed only if the court abused its discretion by allowing clearly prejudicial evidence before the jury. *Gee v. State,* (1979) Ind., 389 N.E.2d 303; *Inman v. State,* (1978) Ind., 383 N.E.2d 820; *Hubble v. State,* (1973) Ind., 299 N.E.2d 612. Prejudice from the admission of photographic evidence does not occur because of the gruesome character of the photograph; rather, it arises because the photograph is not material or relevant or does not shed any light on any issue. *Landers v. State,* (1975) Ind.App., 331 N.E.2d 770.

"The relevancy of photographic evidence may be determined by an inquiry as to whether a witness would be permitted to describe verbally the objects photographed." *Crane v. State,* (1978) Ind., 380 N.E.2d 89, 92. If a photograph is shown to be a true representation of that which it purports to represent, it is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Grooms v. State,* (1978) Ind., 379 N.E.2d 458; *Hawkins v. State,* (1941) Ind., 37 N.E.2d 79. Thus, a photograph may properly be used to visually display what a witness has verbally described. *Meeker v. Robinson,* (1977) Ind.App., 370 N.E.2d 392.

The record reveals testimony from numerous witnesses who were permitted, without objection, to describe the con-

dition of the infant's body, particularly the bruises and marks[1] which they observed thereon. The photographs in question were relevant as illustrative of this testimony. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60. There was, therefore, no error in the admission of these photographs.

II. Admission of Statements

Oral and written statements made by Stemper to police officers were admitted into evidence over Stemper's objection. Defense counsel acknowledged that Stemper was read his rights and that he understood them; the issue is whether or not the statements were voluntarily made. We hold that they were voluntary.

The determination as to whether a confession or statement has been voluntarily given is made by viewing the totality of the circumstances in an effort to determine whether any inducements have been made in the form of threats, promises, or other improper influences. *Williams v. State,* (1979) Ind., 386 N.E.2d 670. While the State at trial bore the burden of proving the voluntariness of Stemper's statement or waiver beyond a reasonable doubt, *Lofton v. State,* (1978) Ind., 378 N.E.2d 834; *Ortiz v. State,* (1976) Ind., 356 N.E.2d 1188, on appeal we review the trial court's determination of voluntariness as we do other sufficiency matters. We do not weigh the evidence or rejudge the witnesses' credibility. We consider only that evidence which supports the decision of the trier of fact in the case of contested evidence, along with any uncontested evidence presented by the appellant. *Williams v. State,* (1979) Ind., 386 N.E.2d 670; *Wollam v. State,* (1978)

[1] The origin of marks which could not have been attributable to actions by Stemper, such as marks which were caused by the use of the resuscitation equipment, was pointed out by the witnesses' testimony so that the jury would not be mislead.

Ind., 380 N.E.2d 82. The trial court's determination will not be disturbed when the ruling is supported by substantial evidence of probative value, even though conflicting evidence on the issue of voluntariness was presented to the trial court. *Pawloski v. State,* (1978) Ind., 380 N.E.2d 1230.

Although Stemper alleged that he had been kicked, beaten, and threatened, all of the police officers named by Stemper as being involved in these activities also testified and denied any threats or unnecessary violence.[2] In light of the fact that we do not weigh conflicting evidence, we find there was sufficient evidence of probative value to support the trial court's determination that Stemper's statements were voluntarily made. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60; *see also Mosley v. State,* No. 878 S 155 (Ind. S. Ct., June 25, 1979). We also note that Stemper took the stand and testified to substantially the same facts as those contained in his statements; by so testifying, he waived any theoretical error in admitting his statements. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60.

III. Verdict Contrary to Law

(a) Absence of Sudden Heat

The essential elements of the crime of voluntary manslaughter are: (1) voluntary killing of a human being; (2) without malice; and (3) in sudden heat. *Green v. State,* (1967) Ind., 229 N.E.2d 726; *Nuss v. State,* (1975) Ind.App., 328 N.E.2d 747. Stemper alleges he could not have been convicted of voluntary manslaughter because

[2] The officers admitted there was some struggling between them and Stemper when Stemper was initially apprehended and transported to the police station. According to the officers, this was precipitated by Stemper's resistance. All of the officers denied any violence or threats of violence in order to induce Stemper to make a statement.

there was insufficient evidence of sudden heat. We disagree.

In addressing a similar allegation, this court in *Hopkins v. State,* (1975) Ind.App., 323 N.E.2d 232 at 239, stated:

> Historically, manslaughter has been treated as a lesser included offense of murder in this State, even after the manslaughter statute was bifurcated in 1969 to distinguish between voluntary and involuntary manslaughter. (citations omitted). The rule has been that if there is evidence which would support a conviction for murder in either degree, then the jury has the right to find a defendant guilty of voluntary (or involuntary) manslaughter *as a lesser included offense,* even in the absence of proof of 'sudden heat.' (our emphasis)

We have no power to set aside a voluntary manslaughter verdict if the evidence would have sustained a finding of guilt of the higher crime of second degree murder. After reviewing the record, we believe that the evidence is clearly sufficient to permit a jury to infer that a homicide had been committed, *Vaden v. State,* (1978) Ind., 383 N.E.2d 60; *Robinson v. State,* (1974) Ind., 317 N.E.2d 850; *Greer v. State,* (1969) Ind., 245 N.E.2d 158; therefore, the jury could properly return a verdict of guilty of voluntary manslaughter, notwithstanding the absence of proof of sudden heat. *McDonald v. State,* (1976) Ind., 346 N.E.2d 569; *Love v. State,* (1978) Ind.App., 383 N.E.2d 382; *Fleetwood v. State,* (1976) Ind.App., 343 N.E.2d 812; *Landers v. State,* (1975) Ind.App., 331 N.E.2d 770.

(b) Unconstitutional Shifting of Burden of Proof

Stemper asserts, alternatively, that the verdict is contrary to law because the burden of proving sudden heat was shifted to him. He contends that such a shifting of

the burden of proof was found in *Mullaney v. Wilbur,* (1975) 421 U.S. 684 to be unconstitutional.

Stemper admits that this allegation of error was not properly preserved for appeal. It is his contention, however, that this is a proper case for application of the fundamental error doctrine. We invoke the doctrine of fundamental error only when a blatant error has occurred which would deny a defendant fundamental due process. *Phillips v. State,* (1978) Ind., 376 N.E.2d 1143; *Williams v. State,* (1978) Ind.App., 383 N.E.2d 416. In reviewing the record and the applicable Indiana law, we conclude that fundamental error did not occur since Indiana's law did not deprive Stemper of due process.

Unlike the Maine law in *Mullaney* which *required* a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter,

> Indiana law *does not have a conclusive presumption* of malice after certain basic facts are shown. Rather Indiana law permits an inference of malice to arise from the proof of certain basic facts. The inference is rebuttable, and *the prosecution still has the ultimate burden of persuasion on the issue.* (emphasis added)

Neff v. State, (1978) Ind.App., 379 N.E.2d 473. Because no conclusive presumption was created and the State still had the burden of proving every element of the offense beyond a reasonable doubt, the Indiana law did not unconstitutionally shift the burden of proof to Stemper. *See Patterson v. New York,* (1977) 432 U.S. 197.

We affirm.

Miller and Young, JJ. concur.